injuries caused by their separate acts.[13] Most of them, however, are really cases of nuisances, in which class of torts a different rule[14] is universally admitted as prevailing.

Though the dissent from the doctrine here maintained is not as great as it would at first appear, there are quite a number of very able courts which take the view that tort-feasors, not acting in concert, or by unity of design, are not liable jointly and severally for damages, although the consequences of the several torts have united to produce an injury to the plaintiff.[15] But this view is decidedly in the minority, and the one first advanced seems much the better on both reason and authority.[16]

NEGLIGENCE OF PARENT IMPUTED TO INFANTS.—The doctrine imputing to an infant the negligence of the parents originated in England.[1] The principle was first recognized in this country in a New York case where an infant of tender years was denied recovery for injuries by reason of the negligence of its parents in allowing it to be in danger.[2] It cannot have any application to infants old enough to be guilty of contributory negligence.[3] Other cases arise where the parent is present and actively negligent. No distinction exists which warrants the application of different rules to the two classes of cases. Of the first class was the case first establishing the rule in this country. It is submitted that the reasoning in the case was unsound, and it has since been much criticized.[4] It denies to the infant the protection of the law. The parent is in truth the guardian of the infant when the latter is not *sui juris,* but it cannot be justly said that the acts of the parent are the acts of the infant, and thus allow, in effect, a waiver by the parent of a tort upon the infant. In Vermont the doctrine was first directly repudiated. There a rule was adopted which has received sanction in a majority of the

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[13] Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Watson *v.* Colusa-Parrot, etc., Co., 31 Mont. 513, 79 Pac. 14; Ames *v.* Dorset Marble Co., 64 Vt. 10, 23 Atl. 857; Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172.

[14] Hyde Park, etc., Co. *v.* Porter, 167 Ill. 276, 47 N. E. 206; Sloggy *v.* Dilworth, *supra;* Pulaski, etc., Coal Co. *v.* Gibbon, 110 Va. 444, 66 S. E. 73.

[15] Lull *v.* Fox & W. Improv. Co., 19 Wis. 100; Little Schuylkill Nav., etc., Co. *v.* Richards, 57 Pa. St. 142, 98 Am. Dec. 209; Dutton *v.* Lansdowne, 198 Pa. St. 563, 48 Atl. 494, 53 L. R. A. 469; Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666; Cole *v.* Lippet, 22 R. I. 31, 46 Atl. 43; Butler *v.* Ashworth, 110 Cal. 614, 43 Pac. 4, 386.

[16] Johnson *v.* Thomas Irvine Lumber Co., *supra.*

[1] Waite *v.* Northeastern Ry. Co., El. Bl. & El. 719, 728.

[2] Hartfield *v.* Roper, 21 Wend. (N. Y.) 615.

[3] McMahon *v.* New York, 33 N. Y. 642.

[4] Kay *v.* Penn. Ry. Co., 65 Pa. St. 264, 3 Am. Rep. 628.

states.[5] While in some, the question is yet to be settled definitely,[6] still the tendency is against the doctrine.

In a recent case under a statute giving right of action for death by wrongful act an infant of tender years was killed while in the custody of its father. The father's active negligence contributed to the death. The father brought suit as administrator for the estate of the child. Recovery was denied, the father's contributory negligence being imputed to the child, and operating as a bar to the action for the benefit of the next of kin. *Ohnesorge* v. *Chicago City Ry. Co.* (Ill.), 102 N. E. 819. In the application of the principle in actions under these statutes the authorities differ widely. The American acts fail to mention the effect of contributory negligence of the beneficiaries.[7] The various cases arising under the forms of action permitted by the statutes have been dealt with by judicial legislation, the result being a state of confusion and conflict among the authorities almost impossible to reconcile.

When the infant is not killed and brings suit for injuries, it is settled that the contributory negligence of the parent is not a bar.[8] When the action is by the parent in his own right for the death or injury of the child, most courts deny any recovery if the parent's negligence contributed.[9] In these cases it seems unnecessary to invoke the doctrine of imputed negligence.[10] The ruling may be sustained on the broad ground that no one should be allowed to profit by his own wrong.

When the action is by the personal representative under the statute for the benefit of the estate different rules prevail. The authorities are unsettled, especially upon cases in which a negligent parent sues as administrator under the statute.[11] The administrator is not himself a beneficiary, and even though the parents are also not mentioned as such, the former is in fact but a nominal party,[12] and has only the rights of those entitled to the estate for which he sued. Therefore the same rule could be applied as to the action by the beneficiary directly. Such is the construction in some states.[13]

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[5] Robinson *v.* Cone, 22 Vt. 213, leading case opposing the doctrine; Norfolk & W. Ry. *v.* Groseclose, 88 Va. 267, 13 S. E. 454; Southern Ry. Co. *v.* Shipp, 169 Ala. 327, 53 So. 150; Warren *v.* Manchester St. Ry. Co., 70 N. H. 352, 47 Atl. 735; Wymore *v.* Mahaska County, 78 Iowa 396, 43 N. W. 264; Ploof *v.* Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017.

[6] Missouri, Kansas and Michigan.

[7] See the statutes collected in TIFFANY, DEATH BY WRONGFUL ACT.

[8] Chicago City Ry. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899

[9] Norfolk & W. Ry. *v.* Groseclose, *supra;* Indionapolis St. Ry. Co. *v.* Antrobus, 33 Ind. App. 663, 71 N. E. 971; Pratt Co. *v.* Brawley, 83 Ala. 171, 3 So. 555.

[10] St. L., & C. Ry. *v.* Dawson, 68 Ark. 1, 56 S. W. 46.

[11] Richmond, etc., Ry. Co. *v.* Martin's Adm., 102 Va. 201, 45 S. E. 894, in accord with the maiority view when the parent is the sole beneficiary. Consolidated Traction Co. *v.* Hone, 59 N. J. L. 275, 35 Atl. 899, reversed on another point in 60 N. J. L. 444, 38 Atl. 759; Bamberger *v.* Ry. Co., 95 Tenn. 18, 13 S. W. 163.

[12] Wolf *v.* Lake Erie & W. Ry., 55 Ohio St. 517, 45 N. E. 708.

[13] Bamberger *v.* Ry. Co., *supra.*

In a few jurisdictions a recovery is allowed for the beneficiaries free from negligence and is denied to those who are negligent.[14] This is the logical solution without taking unwarranted liberties with the statutes, which are practically similar. The result is that when the parent brings the action as administrator he will be denied any recovery because of his contributory negligence if he is the sole beneficiary.[15] Also, when the administrator sues for the benefit of the estate which goes to several beneficiaries, if any of the latter have been contributorily negligent, the recovery will be reduced in proportion to their shares.[16] Thus the one is prevented from profiting by his own wrong and the other beneficiaries receive their compensation as intended by the legislature.

CONTROL BY MANDAMUS OVER JURISDICTIONAL MISTAKE OF LAW. —Where appellate jurisdiction of a cause arising from a justice's or other inferior court is lodged in an intermediate court, and such court erroneously declines to take jurisdiction, or erroneously dismisses an appeal duly taken, the overwhelming weight of modern authority holds that such a mistake of law on the question of jurisdiction, is not final and that the intermediate court may be compelled by mandamus, to proceed with the trial of the case, whenever there is no other adequate remedy by appeal or writ of error.[1] The court has no *right* to dismiss the case and thus deny the appellant his "day in Court;" it is within the *power* of the court so to dismiss the appeal, but such a mistake of law or matter of practice purely preliminary to the real points at issue, will be corrected by mandamus from the highest court. Nor is this a violation of the principle that mandamus does not lie to correct or set aside an exercise of the judicial discretion. The duty to assume jurisdiction is purely ministerial, and where there is no other remedy mandamus lies, not to direct the decision of the court on matters going to the merits, but

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[14] Horton *v.* Forest City Tel. Co., 141 N. C. 455, 54 S. E. 299; Wolf *v.* Lake Erie Ry. Co., *supra.*

[15] Bamberger *v.* Ry. Co., *supra.*

[16] Wolf *v.* Lake Erie Ry., *supra.*

[1] People *v.* Foster, 40 Misc. 19, 81 N. Y. Supp. 212; Kelsey *v.* Church, 112 N. Y. App. Div. 408, 98 N. Y. Supp. 535; Cowan *v.* Fulton, 23 Gratt. (Va.) 579; Richardson *v.* Farrar, 88 Va. 760, 15 S. E. 117; White *v.* Holt, 20 W. Va. 792; Wheeling Bridge Ry. Co. *v.* Paull, 39 W. Va. 142, 19 S. E. 551; Hollon Parker, Petitioner, 133 U. S. 221; In re Connoway, Receiver, 178 U. S. 421, 20 Sup. Ct. 951; In re Turner, 5 Ohio 542; State *v.* McCarty, 52 Ohio St. 362, 39 N. E. 1041; State *v.* Smith, 69 Ohio St. 196, 68 N. E. 1044; Schultze *v.* McLeary, 73 Tex. 92, 11 S. W. 924; Cox *v.* Hightower, 19 Tex. Civ. App. 536, 47 S. W. 1048; Castello *v.* Circuit Court, 28 Mo. 259; Brown *v.* Mining Co., 105 Mich. 653, 63 N. W. 1000; Taylor *v.* Montcalm Circuit Judge, 122 Mich. 692, 81 N. W. 965; State *v.* Court, 13 Mont. 370, 34 Pac. 298; State *v.* District Court, 38 Mont. 166, 99 Pac. 291; Griffin *v.* Howell, 38 Utah 357, 113 Pac. 326; Golden Gate Tile Co. *v.* Superior Court, 159 Cal. 474, 114 Pac. 978; Floyd *v.* District Court (Nev.), 135 Pac. 922.